

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

NO. 77-4057 ORIGINAL

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067, 77-4068,
77-4073, 77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
INTERNATIONAL BUSINESS MACHINES CORPORATION,
SECURITIES INDUSTRY AUTOMATION CORPORATION,
UNITED SYSTEM SERVICE, INC.,
AERONAUTICAL RADIO, INC.,
AIR TRANSPORT ASSOCIATION OF AMERICA,
TELENET COMMUNICATIONS CORPORATION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

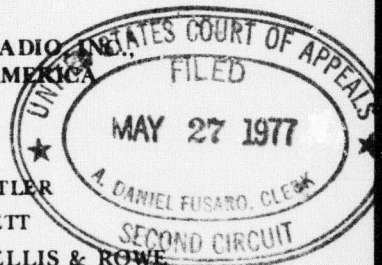
Intervenors.

ON PETITION FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF INTERVENORS AERONAUTICAL RADIO, INC.,
AND AIR TRANSPORT ASSOCIATION OF AMERICA

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ISSUES PRESENTED FOR REVIEW

Aeronautical Radio, Inc. (ARINC) and the Air Transport Association of America (ATA), intervenors in these consolidated cases, will address the issues presented by petitioners United System Service, Inc.

(United) and Telenet Communications Corporation (Telenet) which, in essence, are:¹

1. Whether the Federal Communications Commission (FCC) correctly held that private, non-profit sharing arrangements do not constitute common carriage subject to direct economic regulation under Title II of the Communications Act of 1934.

2. Whether the FCC, having decided that non-profit sharing arrangements are not subject to common carrier regulation, correctly declined to impose other restrictions upon such sharing arrangements.

STATEMENT OF THE CASE

ARINC and ATA have set forth the background of this proceeding in their petitioners' brief in No. 77-4075. However, a brief amplification of their earlier statement of the case may be helpful to the Court in its consideration of the issues raised by United and Telenet.

Although one aspect of the proceeding below was the FCC's investigation of *restrictions* in carrier tariffs against third-party traffic, another important area of inquiry involved whether and to what extent the FCC should regulate traditionally *permitted* intermediary arrangements: line sharing or joint use arrangements, on the one hand, and single customer operations, on the other. *Notice of Inquiry and Proposed Rulemaking*, 47 F.C.C.2d 644, 647-49 (1974) (J.A. 15-17). In line sharing or joint use arrangements, customers of the

¹ARINC and ATA, as petitioners in No. 77-4075, and other parties have raised other issues in their petitioner's briefs.

carrier enter into private arrangements with other users to share the capacity of a line or lines. *Id.* at 647 (J.A. 15). Under single customer tariff provisions, a customer obtains services for specified groups of users. *Id.* at 648-49 (J.A. 16-17).

In its Report and Order, the FCC adopted a definition of the term "sharing" which encompassed the traditional line sharing, joint use, and single customer arrangements which had developed under current tariffs and were described in some detail on the record. According to the Report and Order:

"'sharing' is a non-profit arrangement in which several users, perhaps having no community of interest other than to communicate between the same two geographic points or to communicate with each other, collectively use communications services and facilities obtained from an underlying carrier or a resale carrier, with each user paying the communications-related costs associated with subscription to and collective use of the communications services and facilities according to its pro rata usage of such communications services and facilities."² Report and Order, 60 F.C.C.2d 261, 274 (1976) (J.A. 46).

"Sharing" was distinguished from "resale," "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications service and facilities to the public (with or without 'adding value') for profit." *Id.* at 271 (J.A. 41).

²The FCC stated it did not rule out "any other manner of allocation of the costs of the sharing arrangement, so long as one user does not realize a profit from such allocation (other than reduction of its own communications costs)." 60 F.C.C.2d at 316 n.96 (J.A. 102).

The FCC recognized that "the distinction between sharing and resale may not always be clear," *id.* at 316 (J.A. 102), and confined its decisions concerning sharing to three specific and limited types of arrangements:

- "(a) sharing through a non-profit intermediary;
- (b) 'pure' sharing wherein two or more users combine their needs to share only the costs of communications line service; and
- (c) sharing, either through a for-profit intermediary or in an arrangement wherein one user is the primary user, in which line costs and charges associated with 'augmented' services are shared according to usage. In this case, no management fee may be charged unless the payment is made to an entity other than a sharing participant." *Id.* at 321 (J.A. 108).

On the issue of the regulatory status of sharing, the FCC concluded that "sharing, unlike resale, is not common carriage subject to our Title II jurisdiction." *Id.* at 316 (J.A. 102). Moreover, the FCC declined to impose certification and reporting requirements or *a priori* limits on the permissible number of sharing participants in an arrangement. *Id.* at 317-21 (J.A. 103-08).

SUMMARY OF ARGUMENT

United makes essentially one point in its brief: that the FCC should have decided that entities engaged in sharing arrangements should be regulated as reselling common carriers. United grossly mischaracterizes the FCC's action as involving a "redefinition" of common carriage. In fact, the Commission carefully followed the definition in the Communications Act, as interpreted by

the courts and consistent with its own long-standing administrative interpretation. In particular, the FCC did not, as United suggests, make profit status the sole test of common carriage. Instead, the Commission fully recognized the traditional indicia of common carriage, and, based on its practical experience with non-profit cooperative arrangements in communications over many years, selected the absence of profit as a practical criterion which would, for the most part, correlate with non-common carrier activities.

Telenet makes a related argument: that the FCC should have adopted more restrictive regulations to prevent unregulated resale under the name of sharing.

Contrary to Telenet's argument, the FCC did recognize the possible need to regulate marginal activities which fall within the literal definition of sharing yet actually constitute common carriage. Telenet is merely quibbling with the Commission's selected means of exercising its jurisdiction on an ad hoc basis rather than by adopting rules for which no need was demonstrated and, thus, supplies absolutely no basis for judicial interference with the FCC's exercise of its administrative discretion.

ARGUMENT

I.

THE FCC CORRECTLY CONCLUDED THAT SHARING ARRANGEMENTS DO NOT CONSTITUTE COMMON CARRIAGE.

United's entire brief is premised on its erroneous reading of the FCC's Report and Order as making common carrier status depend solely on whether or not a profit is involved. *E.g.*, United Br. at 8, 10, 11, 12, 14, 15, 18, 21, 24, 27. United repeatedly asserts that

there is no difference between the activities of resellers, who are considered regulated common carriers, and sharers, who are not, except that sharers do not make a profit. *E.g.*, United Br. at 8, 14, 22.

In fact, the Commission unequivocally stated in its Report and Order that it was not blindly and exclusively relying on profit as a test of common carriage.

On the one hand, where an activity falls within the definition of sharing, but there is a profit element involved, the FCC did not hold that the profit element automatically determines common carrier status, but rather that

“we will consider whether Title II jurisdiction is required. We base this position not merely upon the presence of profit. Rather, we look to the substantial likelihood of an indiscriminate offering to the public once one sharer seeks to engage in a profit-making activity.” 60 F.C.C.2d at 317 (J.A. 102).

On the other hand, in speaking of non-profit sharing arrangements, the FCC indicated that the degree of publicity and the length of term involved in such arrangements could affect their common carrier status. *Id.* at 319 (J.A. 106). In general, the FCC said:

“there *are* criteria which have traditionally been looked to in defining common carriage, and thus regulation under Title II of the Act. If we are called upon to rule whether a particular entity is providing resale service or merely sharing, we will not hesitate to make a factual finding regarding whether the offering is being made indiscriminately.” *Id.*

Thus, the FCC made it quite plain that a non-profit activity could be common carriage, and a profit making activity might not be common carriage.

In its Reconsideration Order, 62 F.C.C.2d 588, 600-01 (1977) (J.A. 169), the FCC reiterated its holding "that our jurisdictional position is not based solely upon profit." It explained the role of the profit criterion as follows:

"we feel that to allow the profit motive to be included in the operation would encourage, if not ensure, that sharing arrangements might offer indiscriminately their communications to the public." *Id.*

The above review of the FCC's actual holdings, as distinguished from United's misreading of the Report and Order and Reconsideration Order, shows that the FCC is using the profit test as a pragmatic indicator of whether or not common carriage is involved and demonstrates the utterly false premises underlying United's argument that the FCC "redefined" common carriage and that sharing is common carriage.

Furthermore, the FCC's holding that sharing activities are not common carriage and its use of the profit criterion are entirely consistent with the Communications Act, and court and Commission precedent.

The Act defines a "common carrier" as "any person engaged as a common carrier for hire . . ." 47 U.S.C. §153(h). The legislative history of the Act further states that "the definition does not include any person if not a common carrier in the ordinary sense of the term . . ." H.R. REP. NO. 1918, 73d Cong., 2d Sess. 46 (1934). Obviously, this broad statutory language leaves room for interpretation, as was recognized by Judge Leventhal of the D.C. Circuit in *Philadelphia*

Television Broadcasting Co. v. FCC, 359 F.2d 282, 284 (D.C. Cir. 1966), where the D.C. Circuit deferred to the FCC's interpretation of its common carrier jurisdiction as not encompassing CATV systems:

"Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry."

The FCC's interpretations of its jurisdiction, since nearly the beginning of its existence, have been consistent with the holdings in the proceeding below. As early as 1937, referring specifically to ARINC's operation as a non-profit, industry-owned communications intermediary operating to promote the safety and efficiency of flight, the Commission characterized ARINC's purposes in transmitting messages for air carriers as "distinct from those of a communication carrier for hire." *Aeronautical Radio, Inc. v. American Telephone & Telegraph Co.*, 4 F.C.C. 155, 164 (1937).

In 1949, the FCC provided for cooperative arrangements in its mobile radio regulations whereby a non-profit corporation could supply a non-common carrier radio service to industry members in order to facilitate centralization of radio communication matters and improve the efficiency of use of facilities. *General Mobile Radio Service*, 13 F.C.C. 1190, 1222-23 (1949).

In later years, the FCC in its informal rulings and formal regulatory policy "long made the distinction between persons engaged in providing service as common carriers and those rendering service on a *nonprofit*, cooperative basis." *Cooperative Sharing of Operational*

Fixed Stations, 4 F.C.C.2d 406, 417 (1966) (emphasis added).³ See also *Special Emergency Radio Service*, 24 F.C.C.2d 310, 314 (1970). In *Multiple Licensing – Safety and Special Radio Services*, 24 F.C.C.2d 510, 517 (1970), the Commission pointed out that “for several decades” the Commission’s position has been that “sharing the use and costs” of radio facilities does not constitute common carriage for hire under the Communications Act.

Repeatedly, Title II of the Communications Act has been amended without affecting these administrative interpretations. *E.g.*, 68 Stat. 64 (1954) (mobile radio common carrier jurisdiction); 88 Stat. 1577 (1974) (procedures for certification of extension or discontinuance of carrier service); 90 Stat. 1080 (1976) (tariff procedures). The fact that Congress is exercising continuing oversight of the FCC’s common carrier jurisdiction, and has not disturbed its administrative interpretation of the non-common carrier status of non-profit sharing arrangements lends great weight to that interpretation. See *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 409-10 (1975); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951); 2A [SUTHERLAND] STATUTES AND STATUTORY CONSTRUCTION §49.09, at 256-57 (4th ed. C. Sands 1973).

³For informal rulings, indicating that the absence of a profit was significant, or even critical, for private line sharing to avoid common carrier status, see Letter from FCC to Counsel for Chicago Board of Trade, Jan. 11, 1950 (Public Notice 45049); Letter from FCC to Counsel for Florists’ Telegraph Delivery Ass’n, Dec. 5, 1951 (Public Notice 70819). Compare Letter from Acting Chief, Common Carrier Bureau, to Scantlin Electronics, Inc., with that to Timeplex, Inc., Feb. 5, 1971.

Even the recent decision in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976), apparently relied on by United, held that shared use arrangements under medium to long term private contractual arrangements for Specialized Mobile Radio Systems (SMRS) were not common carriage. Neither the FCC nor the Court relied on the profit test to determine the carrier status of the new SMRS, because an SMRS would be a profit-making entity. Rather, the court's close factual analysis of whether SMRS would offer indiscriminate service to the public led it to conclude that "except for the commercial mode of operation, SMRS will be much like non-profit community repeaters." *Id.* at 643 (footnote omitted). On the basis of this analysis, the Court concluded that even for-profit SMRS would not be carriers. This case obviously does nothing to undercut the FCC's decision below to treat non-profit operations as "*prima facie*" not common carriage 'for hire' within the meaning of the Act." 60 F.C.C.2d at 317 (J.A. 103).

Finally, United advances the self-defeating argument that entities engaging in sharing arrangements are permitted to "discriminate" in deciding who may share their services. United's zeal to attach the pejorative term "discrimination" to sharers loses sight of the fact that a sharer's right to contract privately or refuse to deal with any other party, is a factor recognized in *NARUC v. FCC*, *supra*, to differentiate private carriers from common carriers:

"But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal." 525 F.2d at 641 (footnote omitted).

In sum, the FCC, using the legally correct test for common carriage, properly decided to rely on the absence of profit as a "prima facie" indicator of non-common carriage, subject to a full factual analysis of particular questionable cases.

II.

HAVING CONCLUDED THAT NON-PROFIT SHARED USE OF COMMUNICATIONS WAS NOT SUBJECT TO COMMON CARRIER REGULATION, THE FCC DID NOT ERR IN FAILING TO IMPOSE OTHER REGULATIONS ON SHARING ARRANGEMENTS.

To some extent, Telenet's argument suffers from the same defect as United's: it assumes the FCC has adopted profit as the sole and exclusive test of common carriage. However, Telenet parts company with United by arguing that "the Commission has correctly defined permissible 'sharing' as a non-profit activity" Telenet Br. at 7. Telenet's objection is to the FCC's failure to adopt restrictive regulations of sharing and its approval of certain types of sharing arrangements, which, in Telenet's view, permits the realization of profit.

Virtually all of Telenet's arguments lose their validity in the light of *NARUC v. FCC*, 525 F.2d at 641, which held that "[t]o create this quasi-public character [of a common carrier], it is not enough that a carrier offer his services for a profit" Consequently, the fact that entities participating in a sharing arrangement obtain some economic benefit, regarded by Telenet as "profit in the economic sense" is absolutely irrelevant to the validity of the FCC's use of the profit test in a more conventional sense (*i.e.*, sharing through a non-profit intermediary and cost sharing of lines and

augmented services) as a criterion for identifying non-common carrier activities.

The FCC did not claim that its definition of sharing as a non-profit activity would absolutely eliminate any possible incentive for sharing to become unregulated resale. But this does not mean that it committed legal error by failing to adopt Telenet's suggestions that number limits and/or reporting requirements be imposed on sharing arrangements or that sharers be precluded absolutely from charging other sharers for management fees or augmentation of basic services. In the first place, the Commission found that there was no evidence on the record of abuse calling for numerical limits and that such limits could work to exclude industry members from beneficial sharing arrangements. 60 F.C.C.2d at 317-18 (J.A. 103-04); ARINC Reply Comments at 22 (J.A. 1248). Likewise, the Commission found that regulations pertaining to the authorization and supervision of sharing arrangements would be burdensome and the possible benefits would not outweigh the disadvantages. 60 F.C.C.2d at 320 (J.A. 107).

Second, by expressly indicating that it would, if necessary, make factual findings, applying the traditional criteria of common carriage, about particular entities to determine whether they are reselling or sharing, 60 F.C.C.2d at 319 (J.A. 106), the Commission clearly did not insulate any entity from full compliance with the Communications Act. The FCC's reliance on this ad hoc approach, rather than the adoption of *a priori* rules favored by Telenet, is indisputably a legitimate exercise of the agency's discretion. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

CONCLUSION

For the foregoing reasons, the FCC's decision that non-profit sharing arrangements are prima facie not common carriage and its conclusion not to impose further restrictions on sharing arrangements should be affirmed.

Respectfully submitted,

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